

***United States Court of Appeals
for the Second Circuit***



APPENDIX

PAGINATION AS IN ORIGINAL COPY

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1977

- June 8 1 Filed Petitioner's Motion for leave to proceed in forma pauperis.
- " " 2 " " Affidavit in support of Motion to proceed in forma pauperis.
- " " 3 " Petitioner's Petition for Writ of Habeas Corpus.
- June 10 4 Filed Order that petitioner may file petition without pre-payment of fees and shall not be required to pay Marshal's fees. Mailed
- " 5 Filed Order to Show Cause. Mailed copies to attorneys / to Att
- " Issued Summons.
- 16 6 Filed Pltf's Acceptance of Service.
- June 17 7 Filed Defendants' answer to petition for a writ of habeas corpus.
- June 27 8 Filed Memorandum in Support of Petitioner's Request for a Stay of State Court Proceedings.
- " 9 Filed Petitioner's Memorandum of Law.
- June 29 10. Filed Memorandum of law in opposition to Petitioner's request for stay of state court proceedings.
- June 29 In Chambers before Judge Coffrin, hearing on plaintiff's request for stay of state court proceedings. James Morse, Esq. for plaintiff; William Keefe, Esq. and John C. Everett, Esq. for defendants.
- " 11. Filed stipulation of facts.
- " " Parties agree to a continuance of state proceedings which are scheduled for July 18, 1977, in Superior Court in St. Johnsbury and shall extend until such time that Judge Coffrin has made determination of issue pending before him.
- June 29 12 Filed Summons returned served.
- July 26 13 Filed defendant's trial memorandum
- Aug 12 14 Filed Plaintiff's reply memorandum.
- Aug. 29 In open Court before Judge Coffrin, hearing on application for writ of habeas corpus. Glenn Jarrett, Esq. and James Morse, Esq. for plaintiff; William Keefe, Esq. and John C. Everett, Jr., Esq. for defendants.
- " " Taken under advisement.
- " " Mr. Jarrett moves to substitute Richard Basha in lieu of deft. Theodore Allen.
- " " Ordered: Motion granted.
- Oct. 13 15 Filed Opinion and Order--the petition for a writ of habeas corpus is denied. Copy picked up by Defender General's Office and copy mailed to William T. Keefe, Esq. and Dale O. Gray, Esq.
- " 14 16 Filed Pltf's Notice of Appeal.
- " " 17 " Pltf's Motion for Stay Pending Appeal.
- " " 18 " Pltf's Application for Certificate of Probable Cause.
- " 17 19 " Pltf's Certificate of Service re Application for Certificate of Probable Cause & Motion for Stay Pending Appeal.
- Oct. 19 20. Filed certificate of Probable Cause -- there is ground to believe that the appeal is taken in good faith. Copy mailed to attorneys.
- Oct 25 21 Filed defendants' response to motion for stay pending appeal.
- Oct. 25 In Court, hearing on plaintiff's motion for stay pending appeal. Glenn A. Jarrett, Esq. for plaintiff: John C. Everett, Jr., Esq. for defendants.
- " " Ordered: Motion granted.

PLAINTIFF

DEFENDANT

DOCKET NO. 77-140

Scott David DUNKERLEY

Cornelius HOGAN, et al

PAGE ____ OF ____ PAGES

DATE
1977

NR.

PROCEEDINGS

DATE	NR.	PROCEEDINGS
Nov. 14	✓ 22	Filed Scheduling Order--record on appeal to be filed on or before November 19, 1977. Mailed copy to attorneys.
"	" 23	" Memorandum Opinion--Petitioner's motion for a stay of state court proceedings pending appeal of this court's denial of habeas corpus relief was properly granted following the hearing for the reasons expressed herein. Mailed copy to attorneys.
"	" ✓	Mailed entire record on appeal to Clerk, U.S. Court of Appeals for the Second Circuit. Attorneys notified.

SCOTT DAVID DUNKERLEY,

v.

THEODORE ALLEN, In his official capacity
as Superintendent of the St. Johnsbury
Community Correctional Center,

Docket No.

I. STATEMENT

II. JURISDICTION

III. PARTIES

Office of the
DEFENDER
GENERAL
Montpelier,
Vermont 05602
202 - 828-3168

5. Theodore Allen is sued in his official capacity as Superintendent of the St. Johnsbury Community Correctional Center.

IV. CLAIM

6. On or about October 13, 1976, petitioner was brought to trial on charges of first degree murder, 13 V.S.A. Section 2301, in Orleans Superior Court, Hon. Silvio T. Valente presiding. The jury was sworn and testimony was taken.

7. On or about October 15, 1976, the third day of petitioner's jury trial, petitioner was hospitalized as a result of suffering a partially collapsed lung and was no longer present in the courtroom.

8. At this point, petitioner's attorneys expressed a willingness to have the trial continue. They proposed three alternative methods by which this could occur: 1) that petitioner would agree to a continuance; 2) that petitioner would voluntarily waive his presence pursuant to Vermont Rules of Criminal Procedure 43, and 3) that petitioner could be brought in the courtroom in his present condition.

9. However, the judge sua sponte granted a mistrial over the objection of petitioner's counsel.

10. The requisite manifest necessity for a mistrial was lacking.

11. To once again bring petitioner to trial would violate his right to not be placed in jeopardy twice for the same offense as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

12. Petitioner has exhausted his state remedies pursuant to 28 U.S.C. Section 2254 by filing a motion for permission to appeal with the Orleans County Superior Court. The petition was denied without a hearing on December 3, 1976. A motion for interlocutory appeal was filed with the Vermont Supreme Court on December 7, 1976. The Vermont Supreme Court declined to review this denial on

December 7, 1976. A habeas corpus petition was filed in the Superior Court on December 10, 1976. The petition was denied on January 31, 1977. A notice of appeal to the Vermont Supreme Court was filed on February 7, 1977. The Vermont Supreme Court...[affirmed the denial] on June 7, 1977.

V. PRAYER FOR RELIEF

The petitioner prays the Honorable Court to issue its Writ of Habeas Corpus addressed to Cornelius Hogan, Commissioner of Corrections for the State of Vermont and Theodore Allen, Superintendent of the St. Johnsbury Community Correctional Center, directing them to bring petitioner forthwith before the court and at that time discharge him from further custody. Petitioner further prays that all proceedings in the Superior Court of Orleans County, State of Vermont, be stayed pending the hearing and determination of this petition.

DATED at St. Johnsbury, Vermont this 8th day of June, 1977.

/s/ Scott David Dunkerley
SCOTT DAVID DUNKERLEY

SUBSCRIBED and SWORN to before me this 8th day of June, 1977.

/s/ Alexandra Thayer
Notary Public

DATED at [Montpelier], Vermont, this [8th] day of June, 1977.

/s/ James L. Morse
JAMES L. MORSE
Defender General
State Office Building
Montpelier, VT 05602
Attorney for Petitioner

/s/ Glenn A. Jarrett
GLENN A. JARRETT
Defender, Correctional Facilities
State Office Building
Montpelier, VT 05602
Attorney for Petitioner

Office of the
DEFENDER
GENERAL
Montpelier,
Vermont 05602
02 - 828-3168

STATE OF VERMONT
CALEDONIA COUNTY, ss

Superior Court of Vermont
Caledonia Circuit
Docket No. S1-76
RECEIVED
CLERK
DEFENDER GENERAL

STATE OF VERMONT

V.

SCOTT DAVID DUNKERLEY

§
§
§
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§

MOTION FOR SPEEDY TRIAL DEC 21 1976.

NOW COMES the defendant, Scott David Dunkerley, by and through counsel, Stephen R. Elias, Esq., Public Defender, and moves that the Honorable Court schedule trial of the above captioned cause on September 20, 1976 or as soon thereafter as is practicable, but no later than October 1, 1976. This motion is based on the following grounds:

1. Scott D. Dunkerley was arrested on April 6, 1976 and charged with Murder in the First Degree; he has been incarcerated for lack of meeting the bail conditions since that date.

2. A trial date was set for September 20, 1976 at the Omnibus Hearing held in this cause on July 14, 1976. The defendant has been expectant of that date as the trial date. Counsel for defendant have vigorously prepared their case with the trial date of September 20, 1976 in mind.

3. While incarcerated, the defendant has attempted to commit suicide once by slashing his arms and severing an artery. He also recently has been allegedly implicated in an escape attempt which has precipitated his transfer to the Regional Correctional Center in South Burlington from his former place of incarceration, the Regional Correctional Center at St. Johnsbury. Continued pre-trial detention will further place the defendant in

acute jeopardy of mental and emotional deterioration.

4. Defendant is willing to waive any right to be tried in the Judicial District where the offense occurred if such waiver will in any way materially advance the date of his trial.

Dated at St. Johnsbury in the County of Caledonia, this 27th day of August 1976.

Respectfully submitted,

Stephen R. Elias

Stephen R. Elias, Esq.
Counsel for Scott D. Dunkerley

STATE OF VERMONT

CALEDONIA COUNTY, SS.

SUPERIOR COURT

State of Vermont

v.

Docket No. _____

Scott Dunkerley

WAIVER

The undersigned hereby waives venue on the above-entitled matter in Caledonia County and agrees to a change of venue to Orleans County and consents to a trial in the Superior Court in Newport, Vermont.

DATED at Waterbury, Vermont, this 24th day of September 1976.

APPROVED AS TO FORM:

Scott Dunkerley
Scott Dunkerley

Stephen Elias
STEPHEN ELIAS, ESQ.
Public Defender

James L. Morse
JAMES L. MORSE, ESQ.
Defender General

STATE OF VERMONT

ORLEANS SUPERIOR COURT

OCTOBER 12, 1976

DOCKET NO. S1-760sCacr

STATE OF VERMONT X
 X
 VS. X
 X
SCOTT D. DUNKERLEY X

BEFORE: HON. SILVIO T. VALENTE

APPEARANCES: FOR THE STATE:

William Keefe
Assistant Attorney General

Dale O. Gray
State's Attorney

FOR THE DEFENDANT:

James L. Morse
Defender General's Office

Stephen Elias
Public Defender

STENOGRAPHIC REPORTER:

Codie G. Eastman

1 THE COURT: This afternoon in this case there
2 has been scheduled a competency hearing and we are awaiting
3 the attendance of the Doctor.

4 MR. KEEFE: That is correct, your Honor.

5 THE COURT: And the Court thought that we
6 could make use of the time by going over some rules that
7 we will follow during the trial of this matter in order to have
8 an orderly procedure, and the Court will first of all tell both
9 counsel for the Respondent and the State that this case is
10 scheduled to begin tomorrow morning at 9:30 provided, however,
11 that the Court finds that the Respondent is competent to
12 stand trial, that at the impanelling of the jury we will have
13 two alternate jurors who will also be drawn and once the jury
14 has been impanelled together with the two alternate jurors they
15 shall be sequestered during the trial. Now, the Court has in
16 mind that the Defendant has made a request for a motion not
17 to have the jury sequestered, however, the Court feels and
18 of its own motion is going to order that the jury in this
19 case be sequestered, and we are so going to inform the jury
20 that it is the Court's own motion that they are going to be
21 sequestered during this trial. Further, if there are no
22 objections by the State and the Defendant the Court has in mind
23 that the jury shall have available to them any newspapers or
24 magazines provided that the sheriff in charge of the jury
25 shall first delete therefrom any comments, articles, photographs

1 or reference of any kind during this trial. The jury may
2 also have available to them television or radio but shall be
3 prohibited by the sheriff in charge from listening to or
4 observing any news cast on any station or channel while it is
5 reporting Vermont news. Now, first of all I will ask the State,
6 do you have any objection to that?

7 MR. KEEFE: No, your Honor.

8 THE COURT: May I ask counsel for the Respondent?

9 MR. ELIAS: Your Honor, our position, I would
10 like to state for the record is absolutely apposed to the
11 sequestration of the jurors. Flowing from that position
12 we would take the secondary position that all possible freedoms
13 should be permitted the jurors, as we say, we would prefer to
14 have them go home, be instructed not to watch television,
15 read magazines, papers, etc., but since apparently the Court
16 has made its own ruling on that motion over our objection our
17 position then is they should have all possible freedoms.

18 THE COURT: All right, your comments may be
19 noted for the record.
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C E R T I F I C A T E

I, Codie G. Eastman, Court Reporter and Notary Public do hereby certify that I reported stenographically the foregoing proceedings at the time and place hereinbefore mentioned.

I certify that the foregoing pages, numbered 2 through 3, inclusive, constitute a true and correct transcription of that portion requested of my verbatim stenographic notes of the said proceeding.

I further certify that the same was reduced to typewriting under my direct and sole supervision.

Codie G. Eastman
Codie G. Eastman
Court Reporter

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STATE OF VERMONT
ORLEANS COUNTY, SS.

STATE OF VERMONT
VS.
SCOTT DAVID DUNKERLEY

SUPERIOR COURT
DOCKET NO.

HONORABLE SILVIO T. VALENTE
Presiding

October 15, 1976

APPEARANCES:

William Keefe, Esq., Assistant Attorney General,
and Dale O. Gray, Esq., State's Attorney, Caledonia
County, appearing for the State of Vermont.

Stephen R. Elias, Esq., Public Defender, Caledonia
Essex, Orleans Counties, appearing for the
defendant.

Regina Murtagh, R.P.R.
465 Elm Street
Montpelier, Vermont 05602
229-0153

1 IN CHAMBERS OCTOBER 15, 1976

2 JUDGE: The record may show that we are in
3 chambers. The counsel for the defendant are here. Counsel
4 for the State are here. The defendant is not present.

5 The record can show that just before, I think
6 9 o'clock this morning the Court was advised through the
7 Clerk that word had been received that the defendant had been
8 taken to the hospital and his condition at that time was not
9 known. The Court has subsequently heard from the Doctor,
10 Dr. Natvig, who was in attendance in the emergency room and
11 he advised the Court that although he was not the treating
12 physician he did attend to the defendant in the emergency
13 room and he was of the ~~opinion~~ that the defendant was suffering
14 from a partially collapsed lung.

15 MR. ELIAS: 15%.

16 JUDGE: In his opinion it was approximately
17 15% and further, in his opinion, this young man would have to
18 be confined at the hospital for a period of time. My recoll-
19 ection, at least four or five days. At that time if the lung
20 did not improve they might have to take other measures.

21 The Court, on its own motion appointed Dr.
22 Delmer Durgin to examine the defendant for the Court. I
23 have heard from Dr. Durgin and he confirms the findings of
24 the admitting physiciam, Dr. Natvig. The Doctor looked at
25 the X-rays and told me there was no question that the man

1 was suffering from a partial collapsed lung. That he also
2 felt that he should be confined to the hospital for four
3 or five days. Then he added that he wasn't at all sure after
4 that time if the lung came back whether or not he should be
5 immediately taken back into the courtroom. He just wasn't
6 sure. He says that if the lung did not correct itself that
7 they might have to take more drastic measures. He wasn't
8 prepared at this time to say whether or not they would have
9 to do that. He also said in his opinion it was quite a few
10 days. I said four or five; he said possibly a week he should
11 be there in his hospital. He said he will not be treating
12 this patient, there was another doctor, Dr. Bonvolour, I
13 think it is, and he is going to ask that Doctor to call the
14 Court and inform the Court of the defendant's position.

15 Now, gentlemen, that is going to cause some
16 problems in this case. A question squarely presented to the
17 Court, whether or not the Court should declare a mistrial
18 here as I see it. Do either party have any input at this
19 time?

20 MR. ELIAS: Oh yes. First of all, we would
21 move that the trial be allowed to commence under Rule 43,
22 criminal Rule 43 subsection (b). Although this is a medical
23 event which has happened, without Scott, while we still feel
24 that the situation covered by subsection (b)(1) which states
25 in full "further progress of the trial to and including

1 return of the verdict shall not be prevented whenever a
2 defendant was initially present in noncapital cases
3 voluntarily absents himself after trial has commenced,
4 whether or not he has been informed by the Court of his
5 obligation to remain during the trial." We feel that the
6 trial could go on without him if he gives a voluntary waiver
7 duly notarized and witnessed and the like. We have no
8 objection to the Court, the reporter and the attorneys being
9 present at the taking of such waiver. We feel that the rules
10 have foreseen the possibility of trial continuing. We feel
11 there will be great prejudice to Scott if the trial did not
12 continue. Therefore, on the factors of course, enormous
13 psychologic hardship on his mother to have to be put through
14 another trial as well as the hardship on Scott to be once
15 again put in jeopardy.

16 MR. KEEFE: We don't see this as voluntary
17 absenteeism on the part of the defendant. In any event the
18 State will not proceed with the presentation of evidence
19 without the defendant present in the courtroom at all times.
20 Under no circumstances.

21 JUDGE: Your comment is noted on the record.
22 I will wait for the report from the other doctor.

23 MR. KEEFE: He is calling back again?

24 JUDGE: Dr. Durgin said he is going to
25 contact the doctor that will treat the defendant.

1 MR. KEEFE: When do you expect to hear from
2 him?

3 JUDGE: I was hoping very soon, believe me,
4 as soon as I hear.

5 MR. KEEFE: I assume we'll see what happens
6 then.

7 JUDGE: Right.

8 MR. ELIAS: We would say due, whether or not
9 he wanted as much input as we had to offer on the question
10 of mistrial in the event the motion under Rule 43 was denied,
11 necessarily oppose a mistrial unless and until it became
12 so evident that the time involved was so great, a matter of
13 months, that the trial could not continue. On behalf of the
14 defendant we would be willing to waive any further seques-
15 tration if that were the problem. We would be willing to
16 wait the additional time that is necessary. We note other
17 trials and in other parts of the country the time goes on
18 for months and that we feel that this trial should at all
19 costs continue until completion.

20 MR. KEEFE: We would prefer to state our
21 position on mistrial after we hear what the doctor has said.
22 CONFERENCE CONCLUDED

23 OPEN COURT WITHOUT THE JURY

24 JUDGE: May the record show that we are in
25 open court here on the matter of State of Vermont vs.. Scott

1 Dunkerley. Counsel are well aware here, the respondent has
2 been taken to the hospital and the Court has been in
3 communication with the doctor that the Court has appointed.
4 I did hear since my last report to counsel. I did hear from
5 Dr. Durgin again who said he has consulted with Dr. Bonvorlois
6 who the Court understands will be treating the respondent,
7 and he says, after consultation, they are of the concerted
8 opinion this young man will be in the hospital from 7 to 10
9 days. Further, that is, provided, however, that his
10 condition does not worsen from, at the present time, a
11 partially collapsed lung. That they will have to monitor
12 that situation for the next 24 hours to see if it gets any
13 worse. But in any event with the condition as it now exists
14 they both feel that he will be in there from a week to 10
15 days.

16 Gentlemen, with that information before you
17 I would like to know how you feel about proceeding with this
18 matter.

19 MR. KEEFE: Who did you say go first
20 Your Honor?

21 JUDGE: The State. There is our problem,
22 what do you say about this?

23 MR. KEEFE: As I understand the position of
24 the defense, Your Honor, previously this morning in chambers,
25 they moved that the Court order to proceedings to continue

1 without the presence of the defendant. Our position is that
2 the defense counsel was citing, using the word "voluntary
3 absenteeism from Court after an initial appearance" We
4 take the position this is not a voluntary abstention, quite
5 the contrary, quite involuntary. In any event we take the
6 position because of that word "voluntary," the rule does not
7 apply to this present situation. Under no circumstances,
8 considering the seriousness of this charge will the State
9 consent to the proceedings to go on without the presence
10 of the defendant. I suppose now the only alternative is a
11 mistrial.

12 JUDGE: Are you moving for a mistrial?

13 MR. KEEFE: Not right now. I suppose the
14 defense wants to respond.

15 JUDGE: As to whether or not to proceed
16 without the defendant.

17 MR. ELIAS: We know of no rule of law that
18 confines Scott Dunkerley in the hospital. It may well be
19 that Scott preferred to stay in the hospital given the
20 medical advise that his health is in jeopardy should he
21 leave it. That would be a voluntary act. I know of no
22 mittimus issued confining him to the hospital preventing
23 him from coming to Court. Therefore, if he choses to stay
24 in the hospital his absence from the Court is voluntary. Now
25 I have no question but what Scott himself will have to make

1 the decision whether the trial should or shouldn't go on in
2 his absence. This is a decision which could be made with
3 the court reporter and counsel present in the hospital room.
4 This certainly is not an unprecedented procedure. But we
5 feel that he should be given that option and should he chose
6 to have a trial go on in his absence then the trial could
7 go on in his absence. His testimony could be taken by video
8 deposition which is provided for in the criminal rules when
9 a person is unavailable. Unavailability, one of the reasons
10 is physical illness. We feel that the defendant's rights
11 would be greatly prejudiced by a mistrial, although no motion
12 has been made we vigorously oppose such a motion unless
13 Scott did not want the trial to go on without him, in which
14 case the logical position would have to be a mistrial at
15 that time.

16 JUDGE: Mr. Keefe?

17 MR. KEEFE: Yes Your Honor. The rule that
18 Mr. Elias is speaking of is regarding depositions and
19 "unavailable" refers to witnesses not parties. In so far as
20 the mistrial aspect of this case is concerned we don't think
21 that it, I at least, don't want to move for a mistrial on
22 behalf of the State without checking to see what effect or
23 impact this would have to, on the jeopardy situation. I
24 understand of course under the proper circumstances the Court
25 can declare a mistrial. If that takes place we accept it.

1 I want to do some little bit of research to check and make
2 sure I'm not affecting jeopardy before I make a motion on
3 behalf of the State for a mistrial. Jeopardy is not effected
4 by the Court on its own motion declaring a mistrial.

5 JUDGE: Does someone else have something
6 further to say?

7 MR. ELIAS: I would only add there are even,
8 if not to proceed without him, 10 days could elapse, the
9 Court's motion for sequestration could be modified to allow
10 the jurors to go home with proper instructions to be called
11 back at the end of 10 days if he does get worse, if a matter
12 of months, clearly there does come a time clearly when no
13 justice could be done. We don't feel in light of the other
14 trial held in this state and county and even an intervening
15 time of 7 to 10 days between the taking of evidence is so
16 prejudicial to justice as would require a mistrial.

17 JUDGE: Anything further?

18 MR. KEEFE: We have nothing further.

19 MR. ELIAS: Not at this time.

20 JUDGE: Anything about his physical condition
21 that you want to call to the Court's attention?

22 MR. KEEFE: Except what I have been informed
23 of through the Court I have no reason to question the
24 judgment of these people at the hospital.

25 MR. ELIAS: We have no reason to question it.

1 JUDGE: The Court is going to take a recess.

2 COURT RECESSED AT 10:35

3 OPEN COURT 10:45

4 JUDGE: Gentlemen, the last time the record
5 should show that the jury has not been present during the
6 proceedings here this morning. Since the last time the
7 Court was out here I have had another call from Dr. Bonvouloir
8 who is treating the defendant. He has confirmed what
9 Dr. Durgin has said, that his condition, the defendant's
10 condition as it presently exists in his opinion, the doctor's
11 opinion, he should be confined 7 to 10 days. If he gets
12 worse of course he will be there a lot longer. With that
13 gentlemen the Court of its own motion is going to declare
14 a mistrial. I want to state upon the record that although
15 the Court realizes this is a very serious case that from all
16 indications as the cases preceding it, it will not be a
17 very lengthy case when it is ultimately tried so that is
18 one of the considerations that the Court had in mind in
19 declaring a mistrial. That in order to insure a fair trial
20 for the defendant here, that the Court felt in the interest
21 of justice that a mistrial should be declared. The Court
22 further finds of course that it wasn't any voluntary absence
23 here. He was absent because of a medical condition.
24 Gentlemen, the Court is now going to call the jury and advise
25 the jury of the Court's action.

1 MR. ELIAS: Before or after that I do wish
2 to place comments on the record.

3 JUDGE: Do it at this time.

4 MR. ELIAS: I wish to reiterate the defendant's
5 position first, in fact, he has not been asked what he wants
6 to do. We felt that would come some time if the Court would
7 entertain the possibility of other alternatives to mistrial,
8 he has not been asked what he would want to do. We feel
9 that we know what he would want to do. He would want to
10 have this trial go forward without his presence under the
11 rule and he might even want to disregard doctors orders and
12 come in here and go through the trial no matter what the
13 doctor said if he knew that he was going to have to be sent
14 back at some point back to the correctional center, wait
15 a couple of more months and brought back to trial and watch
16 his mother go through what she went through yesterday. He
17 might very well wish to come back here today and try this
18 case. He has not been given that option. We wish to state
19 that the jury could be sent home. We have confidence in
20 the jury, they could follow the instructions of the judge
21 about viewing media and talking about the case. If he is
22 able to come back 7 to 10 days that would not be an undue
23 delay and our position is that he has been placed in jeopardy
24 here and that any subsequent trial would be double jeopardy.
25 Thank you very much.

1 JUDGE: Do you have any comments Mr. Keefe?

2 MR. KEEFE: We have already made our position
3 clear.

4 JUDGE: Alright, Court Officer, would you
5 kindly bring in the jury.

6 OPEN COURT WITH JURY PRESENT

7 JUDGE: Good morning ladies and gentlemen.
8 Ladies and gentlemen, you're probably wondering why we didn't
9 start on time this morning. There is always a reason and I
10 will have to inform you, early this morning, I don't know how
11 early, at least 9 o'clock, I got the message the defendant
12 was taken to the hospital. Since that time I have been on
13 the phone with the doctors to find out about his medical
14 condition. I think you people have a right to know that he
15 is suffering from a partially collapsed lung. The doctors
16 estimated it being 15 or 20% collapsed. With that type
17 of condition, what they have to do is watch it very closely
18 and what the doctors feel is that the condition as it now
19 exists he should be confined probably for at least a week
20 or 10 days. If he gets worse he will be confined for a
21 longer period. So because of that, ladies and gentlemen,
22 the Court here is going to declare a mistrial in this case.
23 I don't think I have any alternative in fairness to both the
24 respondent and the State I have to declare a mistrial. But
25 I want to thank you people for the attention that you have

1 given this case and but these are the things that happen. I
2 feel in the interest of justice it was the only thing to do,
3 declare a mistrial and send you people home and not keep you
4 together.

5 COURT ADJOURNED.

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ENTRY ORDER

SUPREME COURT DOCKET NO.

56-77

JUN 7 1977

FEBRUARY

TERM, 19 77

In re Scott David Dunkerley

APPEALED FROM:

Chittenden Superior Court

DOCKET NO.

In the above entitled cause the Clerk will enter:

Judgment affirmed.

Dissenting:

FOR THE COURT:

Albert W. Barney
Albert W. Barney, Chief Justice

Rudolph J. Daley
Rudolph J. Daley, Associate Justice

Robert W. Larrow
Robert W. Larrow, Associate Justice

Franklin S. Billings
Franklin S. Billings, Associate Justice

William C. Hill
William C. Hill, Associate Justice

2M 5-73

In re Scott David Dunkerley

JUN 1 1977
Supreme Court

On Appeal From
Chittenden Superior Court

February Term, 1977

Present: Barney, C.J., Daley, Larrow, Billings, and Hill, JJ.

BARNEY, C.J. This is a petition for habeas corpus based on the prohibition against double jeopardy. The issue came about as the result of emergency hospitalization of the defendant on the third day of his trial for the killing of his stepfather, under a prosecution for first-degree murder. The diagnosis relating to the emergency hospitalization was that of a collapsed lung with a prognosis of a seven- to ten-day hospitalization period. The trial court had another doctor examine the defendant and the diagnosis was confirmed by him, and by a third doctor who was to treat the defendant. The court then ordered a mistrial on its own motion. It is the defendant's position that that ruling raises the barrier of double jeopardy and prevents re-trial.

The contested issue in the case related to the insanity or diminished capacity of the defendant so that he would be not guilty by reason of insanity or, at least, not guilty of first-degree murder. This was the only defense put forward; the facts of the shooting of the stepfather with a .22 caliber pistol were not disputed.

At the time of the medical emergency, the jury had been empanelled and the trial was under way. Opening statements describing the theories of the prosecution and defense had been made to the jury. The defendant's mother had testified about the shooting and the relationship between her son, the defendant, and her husband, his stepfather. She had also testified about the

defendant's childhood and about his personal difficulties. She had testified on both direct and cross-examination. After the completion of this examination, the court had recessed for the day. It was the following morning that Dunkerley was taken to the hospital.

The decision to declare a mistrial was left to the trial court. The State refused to move for that disposition, and the defendant, through his attorney, opposed stopping the trial. Defendant's counsel proposed that the defendant waive his right to be present at the trial so that the proceedings could continue. It was also proposed that sequestration of the jury be waived and, if necessary, the trial be temporarily recessed. Counsel based the claim of right upon V.R.Cr.P. 43(b), which provides:

The further progress of the trial to and including the return of the verdict shall not be prevented whenever a defendant, initially present,

(1) in noncapital cases, voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, or

(2) engages in conduct which is such as to justify his being excluded from the courtroom.

The trial court denied the motion on the basis that the defendant's absence from the courtroom was not "voluntary", as contemplated by the rule in question. In the trial of the habeas corpus petition, that court took the same view - that the absence of the defendant was not voluntary, and that retrial after the declaration of mistrial would not involve double jeopardy. The defendant appealed that decision here.

The defendant's concern for the continuation of the trial centers on the testimony of his mother. She was a witness to his psychological dependence upon her, and to the possibility of his losing touch with reality and believing that she wanted her husband dead. She testified to her husband's mistreatment of her and his dislike of the defendant. From a tactical point of view, it was

the opinion of defendant's counsel that this testimonial appearance went well, and that there was risk that a second appearance, before a new jury, might not go as well, and, further, would cause great emotional distress to the defendant's mother, a key witness.

Under former Vermont practice, the declaration of a mistrial would not have automatically raised a bar of double jeopardy. since it irrevocably attached only upon rendition of a judgment of not guilty. State v. Velandier, 123 Vt. 60, 61, 181 A.2d 60 (1962); State v. Frotten, 114 Vt. 410, 416-17, 46 A.2d 921 (1946). It was discretionary with the trial judge as to whether he would require the trial to go forward, allow retrial, or order a verdict directed in favor of the defendant. That practice did have the advantage of lessening the tactical maneuvering generated by automatic rules of jeopardy that apply in early trial stages. The trial judge had the authority to prevent any improper impositions or an infringement of a defendant's rights. State v. Deso, 110 Vt. 1, 10-11, 1 A.2d 710 (1938).

Since Benton v. Maryland, 395 U.S. 784 (1969), Vermont law relating to former jeopardy has, through the operation of the Fourteenth Amendment, become the law of the Double Jeopardy Clause of the Fifth Amendment. Cases raising the issue must be reviewed under the standards for that clause as set out by the United States Supreme Court.

Jeopardy attaches, in contrast to previous Vermont practice, with empanelling and swearing in of the jury, or, in a trial by court, when the court begins to receive evidence. Illinois v. Somerville, 410 U.S. 458, 471 (1973) (White, J., dissenting). This case had passed that point. It was interrupted short of verdict.

The law of United States v. Perez, 9 Wheaton 579, 580 (1824), is still cited as the governing law of mistrial, as recently as United States v. Martin Linen Supply Co., 45 U.S.L.W. 4337, decided April 4, 1977. The guiding principle stated by Mr. Justice Story reads:

The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.

Thus, under the Double Jeopardy Clause also, it has been found necessary to make room for the operation of judicial judgment to prevent the application of the doctrine from being unfair or used to defeat the ends of justice. Although the approaches may differ, basic constitutional objectives have a way of ending up with comparable standards for substantively identical objectives.

The Perez case, quoted above, stated in 1824 that definition of all the circumstances governing the exercise of judicial discretion in granting a mistrial is impossible. The Supreme Court maintains that position until this very day. Various concerns have been mentioned, but none has been set out as a governing concern that would override the judge's duty to exercise his discretion.

One of the discretionary concerns talked about in recent cases relates to the interest of the defendant in carrying his trial through to verdict be-

States v. Jorn, 400 U.S. 470, 486 (1971). But, again the cases make this no more than a circumstance the judge must fully and fairly consider in reaching a decision on the propriety of a mistrial. Wade v. Hunter, 336 U.S. 684, 689 (1949). It does not reach the status of a binding or governing requirement, since its unfounded assertion could be used too easily to defeat the ends of public justice. There is no suggestion in this case that it was ignored as a consideration by the trial court.

Along with the double jeopardy issue in this case is the additional constitutional concern relating to the presence of the accused at his trial to confront the witnesses against him. The argument on behalf of the defendant would reduce this issue to the simple volitional choice of the defendant to insist upon or waive this Sixth Amendment right. The trial judge was burdened with the duty of taking a broader look at the issues involved, in arriving at his discretionary ruling.

There is no doubt but what a judge may allow a non-capital trial to proceed in the absence of a defendant given an effective waiver of his Sixth Amendment right to be present. Indeed, a waiver may even be constructed from the actions of the defendant, including his deliberate non-attendance at the trial. This is what V.R.Cr.P. 43(b) is all about. Its basic design is to convert certain deliberate actions of a defendant into waivers of his right to be present. The purpose is to prevent a defendant, by such deliberate acts, being able to bar the holding of a trial to determine his guilt or innocence. See Illinois v. Allen, 397 U.S. 337 (1970).

Both the trial court and the judge hearing the habeas corpus petition held the defendant's absence to be involuntary. Considering the inception of the problem, this is, of course, correct. From this fact, the conclusion

followed that V.R.Cr.P. 43(b) did not apply. Although the result reached is correct, it is necessary to comment on the underlying legal principles.

The unstated premise in the defendant's contention involving his Sixth Amendment right to be present and V.R.Cr.P. 43(b) is that he has a constitutional right to have the trial proceed without him if he waives attendance. It is upon this basis that counsel for the defendant have sought to convert his necessary and inadvertent absence into a voluntary one by subsequent waiver.

Defendant concedes that the defendant's alleged right to have a criminal trial continue in his absence has limitations, such as where his identity is at issue, citing United States v. Fitzpatrick, 437 F.2d 19, 27 (2d Cir. 1970). With insanity the governing factual issue in this case, a comparable concern relating to the defendant's presence in court arises in connection with the jury's observation and evaluation of him with respect to his mental condition. See State v. Pigeon, 133 Vt. 253, 257, 336 A.2d 174 (1975).

The proposed waiver of the defendant's right to be present did not compel the trial court to go forward or require that the mistrial constitute double jeopardy. V.R.Cr.P. 43(b) is a rule which does no more than permit certain conduct of a defendant to be construed as a waiver of his constitutional right to be present at the trial, thereby permitting the trial court to exercise its discretion in that light as to whether or not a mistrial should be granted, subject to all the other considerations expressed in United States Supreme Court opinions following United States v. Perez, supra, 9 Wheaton 579 (1824).

In Featherston v. Mitchell, 418 F.2d 582, 586 (5th Cir. 1969), cert. denied 397 U.S. 937, we find the statement, "Protection of Featherston's right not to be so tried, notwithstanding the protestations of his lawyers, made imperative

a mistrial of this case." The issue was one of mental competency raised during the fourth week of trial, based on diabetic "blackouts". The mistrial was granted over the objections of the trial counsel. The application of judicial discretion was held necessary and proper.

The Second Circuit, speaking through Judge Lumbard in United States v. Tortora, 464 F.2d 1202, 1210 (2d Cir. 1972), cert. denied 409 U.S. 1063, stated with respect to the continuation of a trial with the defendant absent:

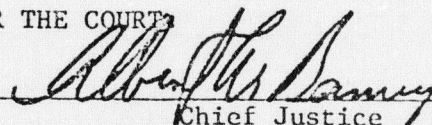
We do not here lay down a general rule that, in every case in which the defendant is voluntarily absent at the empanelment of the jury and the taking of the evidence, the trial judge should proceed with the trial. We only hold that this is within the discretion of the trial judge, to be utilized only in circumstances as extraordinary as those before us. Indeed, we would add that this discretion should be exercised only when the public interest clearly outweighs that of the voluntarily absent defendant.

This is our view of the law, that continuation of a trial with a defendant absent is the extraordinary case, to be undertaken only after the exercise of a careful discretion by the trial judge. The voluntary nature of the defendant's absence only makes the continuation of the trial possible after a review of all the appropriate concerns; it does not compel the trial to go on.

In this case, the record discloses not only the insanity issue, but also a possible prolonged absence by the defendant. Moreover, with the growing body of law that permits a defendant to disaffirm actions such as waiver by attorneys on his behalf, soundly or unsoundly, a realistic evaluation of the comparative interests of the public and the defendant in a trial without the issue of his right to be present is appropriate. It has not been made to appear that the order of mistrial was made in a context that now requires the application of the doctrine of double jeopardy.

Judgment affirmed.

FOR THE COURT


Chief Justice

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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COPY

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Scott David Dunkerley

v.

Cornelius Hogan, in his official:
capacity as Commissioner of
Corrections for the State of
Vermont,

Theodore Allen, in his official
capacity as Superintendent of
the St. Johnsbury Community
Correctional Center

Civil Action

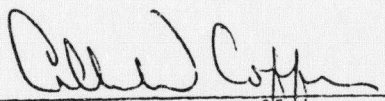
File No. 77-140

ORDER TO SHOW CAUSE

Upon consideration of petitioner's petition for
a writ of habeas corpus filed June 10, 1977, it is hereby
ORDERED:

That a copy of the petition for writ of habeas
corpus be served forthwith upon Cornelius Hogan, in his
official capacity as Commissioner of Corrections for the
State of Vermont, and Theodore Allen, in his official capacity
as Superintendent of the St. Johnsbury Community Correctional
Center, and that said defendants be ordered to appear before
the Honorable Albert W. Coffrin, United States District Judge,
at Burlington, Vermont, on Wednesday, June 15, 1977, at
4:00 o'clock in the afternoon to show cause, if any they may
have, why said writ of habeas corpus should not be granted.

Dated at Burlington in the District of Vermont,
this 10th day of June, 1977.


Albert W. Coffrin
District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Scott David Dunkerly :

v. :

Cornelius Hogan, in his official :
capacity as Commissioner of :
Corrections for the State of :
Vermont, :

Civil Action

File No. 77-140

Theodore Allen, in his official :
capacity as Superintendent of :
the St. Johnsbury Community :
Correctional Center :

STIPULATION OF FACTS

1. Petitioner is presently incarcerated at the St. Johnsbury Community Correctional Center in St. Johnsbury, Vermont, pursuant to a mittimus of Vermont Superior Court, Caledonia County, and for lack of \$50,000.00 bail on a charge of first degree murder in violation of 13 V.S.A. Section 2301;
2. Petitioner is in the custody of Cornelius Hogan, Commissioner of Corrections, and Theodore Allen, Superintendent of the St. Johnsbury Community Correctional Center;
3. Petitioner was brought to trial by jury in Orleans Superior Court on October 13, 1976, on the charge of first degree murder;
4. After two days of trial, petitioner was hospitalized on October 15, 1976, because he suffered a partially collapsed lung;
5. The transcript marked Exhibit 4 attached to Petitioner's Memorandum of Law accurately reflects the proceeding in which a mistrial was declared.
6. The petitioner was returned to the Chittenden Community Correctional Center in South Burlington, Vermont, on October 25, 1976, where he remained until transferred to the St. Johnsbury Community Correctional Center on May 24, 1977.

Office of the
DEFENDER
GENERAL
Montpelier,
Vermont 05602
802 - 828-3168

DATED at Montpelier, Vermont, this 24th day of June, 1977.

/S/ James L. Morse
James L. Morse, Esq.

DATED at Burlington, Vermont, this 29th day of June, 1977.

/S/ John Everett, Jr.
Dale O. Gray, Esq.
Caledonia County State's Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

SCOTT DAVID DUNKERLY

:

vs.

: Civil Action No.
77-140

CORNELIUS HOGAN, in his official :
capacity of Commissioner of
Corrections for the State of :
Vermont, et al

:

:

H E A R I N G

on Application for Writ of Habeus
Corpus, held on Monday, August 29,
1977, at 11 a.m. at Burlington,
Vermont.

Hon. Albert W. Coffrin, Presiding

APPEARANCES:

Glenn A. Jarrett, Esquire and James Morse, Esquire, on
behalf of the Plaintiff;

William T. Keefe, Esquire, on behalf of the Defendants.

1 (The following are excerpts from the Hearing held on
2 the date and place on page 1 hereof)
3 -----

4 MR. EVERTS: The Rule did not apply.
5 The Jury could not go forward. The Judge faced the
6 manifest necessity of declaring a mistrial because
7 the Defendant was unfortunately absent.

8 THE COURT: Well, in part wasn't that due to the state-
9 ment of the prosecution that under no conditions would they
10 go forward with the trial in the absence of the Defendant?

11 MR. EVERTS: I don't believe so, Your Honor.

12 THE COURT: Why did the prosecution take that stand?

13 MR. EVERTS: The prosecution took the stand for
14 a number of reasons. Merely as a tactic to try
15 and convince the Judge of their position because the
16 State felt that it would be important in this trial,
17 with the serious charge of murder no longer capital
18 in the State of Vermont, that the Defendant be present
19 at every stage of the trial.

20 THE COURT: If the Prosecution had not taken this
21 attitude and the trial had gone forward, let's say, and the
22 higher court held it shouldn't have gone forward under
23 those circumstances it would have been retried.

24 MR. EVERTS: Yes, it could have been.

25 THE COURT: I mean, there wouldn't have been double

1 jeopardy problem under those circumstances, would there?
2 MR. EVERTS: Well, there probably would not be, but
3 there might. This is a double jeopardy problem
4 again. You are going to be placing the Defendant,
5 the Petitioner here, after a trial which has been
6 reversed to a second trial, to undergo the same
7 stress and bother which the Petitioner makes so
8 much light of, and I would like to argue in that
9 type of situation that we would be here in
10 this very Court arguing a habeas petition over
11 that very issue.

12 -----(end of excerpt)-----
13

14
15 MR. KEEFE: Your Honor, may I add one thing?

16 THE COURT: Yes.

17 MR. KEEFE: Your Honor, Mr. Everts made an inference
18 about the fact that under no circumstances would
19 the State continue without the Defendant present.
20 That statement was made by me, and although I do
21 not recall specifically what I had on my mind at the
22 time, we were obviously objecting to the trial
23 continuing in the absence of the Defendant.
24 That aside, had the Judge ordered a continuance of
25 the trial without the Defendant, the State would
have gone along with that in presenting its case.

1 We do not want the Court to get the idea we would
2 not continue our case.

3 THE COURT: The Court does not get that, but it seems to
4 me the prosecution was pretty strong in its
5 statement.

6 MR. KEEFE: It does appear strong on its face, I
7 agree.

8 THE COURT: Mr. Morse?

9 MR. MORSE: May it please the Court: Mr. Keefe
10 said at this date if he had the knowledge of the
11 Monday morning quarter back and things been
12 different, he would, of course, have gone along
13 with the Judge's wish for the trial to proceed.
14 However, the appearances at that time did not seem
15 to impart that understanding he is impressing today.
16 He also said when the Judge enquired did the State
17 move for a mistrial, he said no, the State would not
18 move for mistrial, based on doubt as to what the
19 double-jeopardy ramifications might be, but if the
20 Judge declared a mistrial on their own motions there
21 would not be double-jeopardy problems... another spur
22 to push the Judge into declaring a mistrial over
23 the continued objections of the defence.

24 An issue here seems to be: Who is going to
25 decide what is in the defendant's best interests?

1 We are dealing with a judicial system where the
2 defence evaluates its strategy, its strengths and weak-
3 nesses and proceeds accordingly within definite
4 Rules of Law.

5 We believe in this case the Defendant was in a
6 position where it could adequately evaluate various
7 alternatives that would be in their client's best
8 interests at the time. The last thing in the world
9 the Defendant wanted to do was to stop the trial. It
10 seemed to us the worst part of the case had gone by;
11 that the case was in a good posture from a defence
12 point of view at that time, and in light of various
13 Rules of Law, Rule 43B, and also the rule of common
14 sense, that we did not feel it absolutely necessary
15 that the Defendant at that point in the trial continue
16 to be in the Courtroom.

17 -----(end of excerpt) -----
18
19
20
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24
25

CERTIFICATE

I, Joyce M. Maranville, Notary Public and
Official Court Reporter for the United States
District Court for the District of Vermont, hereby
certify that the foregoing pages, numbered 2 through
5, inclusive, are a verbatim transcription of my
verbatim stenographic notes of excerpts of the
Hearing on Application for Writ of Habeas Corpus,
held at Burlington, Vermont, on Monday August 27,
1977, at 11 a.m. Hon. Albert W. Coffrin, Presiding.
and in re: SCOTT DAVID DUNKERLY vs. CORNELIUS HOGAN,
et al, Civil Action No. 77-140, now pending in the
United States District Court for the District of
Vermont.

November 16, 1977

COPY

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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CLERK KWZ
DEPUTY CLERK

Scott David Dunkerley :
v. : Civil Action
Cornelius Hogan, in his : File No. 77-140
official capacity as :
Commissioner of Corrections :
for the State of Vermont, and :
Theodore Allen, in his official :
capacity as Superintendent of :
the St. Johnsbury Community :
Correctional Center :

OPINION AND ORDER

This is a petition for habeas corpus brought on the grounds that retrial of the petitioner after his first trial ended in a mistrial declared sua sponte by the trial judge, would violate the double jeopardy clause of the Fifth Amendment as applied to the states by the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). The outcome of this case conceivably could be affected by the Supreme Court's decision in Arizona v. Washington, 546 F.2d 829 (9th Cir. 1976), cert. granted, 97 S. Ct. 1643 (1977), in which the Ninth Circuit granted habeas corpus relief where the trial court had declared a mistrial without indicating whether it considered the efficacy of alternatives to mistrial. Because petitioner here seeks release from confinement, we are unable to wait for that decision but must act on this petition expeditiously.

On October 13, 1976 petitioner was brought to trial for the first degree murder of his stepfather. After

two days of trial, petitioner was hospitalized because of a partially collapsed lung. There is no indication that the disability was in any way induced by petitioner. Upon learning of the hospitalization, the trial court had three conferences with prosecution and defense counsel at which he solicited their recommendations as to how to proceed. Defense counsel requested either a continuance for the seven to ten days petitioner's doctors anticipated he would be incapacitated, or a voluntary waiver by petitioner of further appearance under Vermont Rule of Criminal Procedure 43(b)(1). Counsel told the court that he wanted to avoid a second trial because a mistrial would greatly prejudice petitioner's rights, testifying caused petitioner's mother "enormous psychological hardship", and having to go through two trials would cause petitioner hardship.^{1/} Here petitioner alleges in addition that he desired to continue the trial because he wanted a speedy trial and because "in the opinion of the defense the trial was going particularly well for the defendant."^{2/}

At the time when declaration of a mistrial was being considered, petitioner's mother had already testified regarding the events of the night of the shooting and regarding her relationship with her son, his childhood, his dependence upon her and the animosity between him and his stepfather. The state had indicated that it intended to call two psychiatrists, several police officers, some laboratory personnel and the chief medical examiner. The defense had indicated that it intended to call petitioner and two other psychiatrists.

In response to the alternatives suggested by counsel for the defense, the prosecution told the court the state would not proceed without petitioner's presence, and suggested that the court might declare a mistrial sua sponte. The prosecution refused to move for mistrial itself without researching whether double jeopardy would bar retrial. Approximately two hours after learning of the hospitalization, the trial judge declared a mistrial because he felt the case would not be very lengthy when ultimately tried, and that a mistrial was necessary "in order to insure a fair trial for the defendant" and "in the interest of justice."^{3/} He advised the jury that he did not see any other alternative in fairness to both the respondent and the state.^{4/}

Subsequently the trial court dismissed petitioner's motion to dismiss on grounds of double jeopardy and denied, as did the Vermont Supreme Court, his motion to file an interlocutory appeal. A petition for writ of habeas corpus filed in Chittenden Superior Court was denied with written findings on January 31, 1977, and affirmed by the Vermont Supreme Court. In re Dunkerley, No. 56-77 (Vt. Sup. Ct. June 7, 1977). For reasons set out below, we deny the petition.

Before embarking on a discussion of petitioner's arguments, we should note that there is no question but that jeopardy had attached when the mistrial was declared. The jury had been selected and sworn and evidence had been taken. Downum v. United States, 372 U.S. 734 (1963). Also, as pointed out by the Vermont Supreme Court in its June 7, 1977

opinion, the guiding principle in the law of mistrial is that the double jeopardy clause does not bar retrial where courts "discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (Story, J.). As the United States Supreme Court has cautioned, the principle of Perez does not allow for rigid categorization of circumstances in which mistrial bars reprosecution. Rather judicial discretion must be exercised to further the ends of public justice. United States v. Jorn, 400 U.S. 470, 485-86 (1971); accord, Wade v. Hunter, 336 U.S. 684, 691 (1949).

Petitioner's first argument is that habeas corpus relief should be granted because the mistrial was not in the "sole interest of the defendant." Leaving aside the fact that the viability of this test has been questioned, United States v. Grasso, 552 F.2d 46, 51 (2d Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3089 (U.S. May 6, 1977) (No. 76-1543), the three cases upon which petitioner relies for this argument do not require a grant of habeas corpus relief in the case before us. First Gori v. United States, 367 U.S. 364 (1961), is support for the converse proposition: When a mistrial is declared solely in the interest of the defendant, the Court will not hold that a retrial is necessarily barred. Id. at 369. The Gori Court emphasizes that the trial judge's exercise of his discretion to declare a mistrial will not be "scrutinize[d] with sharp surveillance". Id. at 368.

Second, the Court in United States v. Jorn, 400 U.S. 470 (1971), holds that reprosecution would constitute double jeopardy. A plurality of the Court found that the trial judge abused his discretion by declaring a mistrial for dubious reasons and without ever considering the possibility of a trial continuance or giving either side the opportunity to object to his ruling. Although the Court first seems to indicate that double jeopardy prohibits reprosecution unless mistrial is declared "in the sole interest of the defendant," the Court subsequently states that "a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision." Id. at 483. Again, the Court emphasizes that the trial judge must weigh all the circumstances to determine whether there is a "manifest necessity" for a sua sponte declaration of a mistrial. Specifically, the trial court must consider the lack of preparedness of the government, the potential risks of abuse by the defendant of society's unwillingness to subject him to repeated prosecutions unnecessarily, and the importance to the defendant of being able to go to verdict with a jury he might believe to be favorably disposed to his fate. Id. at 485-86..

Finally, in United States v. Glover, 506 F.2d 291 (2d Cir. 1974), the court reversed Glover's conviction, arguing that the plurality opinion in Jorn restricted Gori to cases where the trial judge was acting in the "sole" interest of the defendant. The Glover court found that the thrust of Jorn is that "where the mistrial is not motivated

for the benefit of the defendant, and the defendant has done nothing himself to create the problem, he is entitled to his double jeopardy protection." Id. at 297. Note, however, that the Supreme Court in Illinois v. Somerville, 410 U.S. 458 (1973), warns against divorcing the language of Jorn from its facts which were that the action of the trial judge could "fairly be described as erratic", and notes that Jorn "did not hold that [the defendant's right to proceed before the first jury] may never be forced to yield . . . to 'the public's interest in fair trials designed to end in just judgments.'" Id. at 469-70.

The Glover court found the following facts to support its reversal: The mistrial was granted for the benefit of Glover's codefendants; Glover had done nothing to bring about the mistrial; the prosecutor had requested a mistrial; the government had inadequate proof to proceed with trial; evidence had been presented against the defendant; and a permissive attitude toward mistrials in multiple defendant conspiracy cases could lead to an erosion of the double jeopardy provision. 506 F.2d at 297-98.

In contrast, in the case before us, the mistrial was granted to insure fairness to both the prosecution and the defense; petitioner's medical disability resulted in the mistrial; the prosecutor specifically did not request a mistrial; there is no evidence that the government was not prepared to proceed; and this is not a case of conspiracy or multiple defendants. Consequently, we do not believe Gori, Jorn or Glover compel a grant of habeas corpus relief in this case.

Petitioner's first argument is most forcefully supported by United States v. Grasso, 552 F.2d 46 (2d Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3089 (U.S. May 6, 1977) (No. 76-1543). There the Second Circuit affirmed the dismissal of an indictment for tax evasion where the mistrial was caused by a government witness recanting his testimony and where the only findings by the trial court were that the issues would be confused if the trial were to continue. The appellate court noted that the central holding of the Jorn case probably is the "consideration of other alternatives" test articulated in the plurality opinion. Id. at 52 n.2. The Grasso court held that double jeopardy barred retrial under either the Jorn test or the "sole interest of the defendant" test and stated, in dictum, that a procedural corollary of Jorn is that before a trial judge declares a mistrial, he must make explicit findings that there are no reasonable alternatives to mistrial. Id. at 52.

However, Grasso is distinguishable from the case before us for the following reasons: There, mistrial was provided by the prosecution's witness recanting his testimony rather than by the involuntary physical incapacity of the defendant; the prosecution could have continued on counts unaffected by the recantation or on all counts with a proper instruction to the jury; and most importantly, there was scant evidence that the trial court in Grasso explored alternatives to mistrial other than the defendant's motion to dismiss or for acquittal.^{5/}

In the instant case, the judge was aware of alternatives to mistrial because they had been advanced by counsel and of the preference of the defendant's attorney for

obtaining a verdict with the impanelled jury. His decision was not a hasty one. In addition, neither the prosecution nor a government witness was the cause for the interruption of the trial. Under these circumstances we cannot say, after viewing the evidence most favorably to the petitioner, that the declaration was clearly erroneous or an abuse of the discretion of the trial judge. Determining whether or not to grant a continuance or to proceed without the defendant present is an area particularly within the competence of the trial judge. Thus, we will not fault the declaration of mistrial where the trial court considers all the circumstances and reasonably concludes that there is a manifest necessity for or the ends of public justice require such a declaration. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).^{6/}

Petitioner's second argument is that he has a statutory right to waive his further appearance at trial pursuant to Vermont Rule of Criminal Procedure 43(b)(1). It is clear from a straightforward reading of the rule set out in the margin^{7/} that the rule merely allows the continuance of a trial; it does not give a defendant the right to have his trial proceed without him. The Reporter's Notes support this position. Consequently, petitioner has no claim under Rule 43(b)(1).^{8/} See United States v. Tortora, 464 F.2d 1202, 1210 (2d Cir.), cert. denied, 409 U.S. 1063 (1972) (trial court should exercise its discretion to proceed without defendant's presence only in extraordinary circumstances).

Third, petitioner argues that he has a constitutional right to waive his sixth amendment right to confront the

witnesses against him. He argues that because Faretta v. California, 422 U.S. 806 (1975), held that a defendant has a right to waive assistance of counsel while the Sixth Amendment gives a right to assistance of counsel, petitioner has a right to waive confrontation of witnesses as the Sixth Amendment provides the right to confront witnesses. However, petitioner's premise is incorrect. The Court in Faretta held that the right to self-representation is "necessarily implied by the structure of the [Sixth] Amendment", id. at 819; it did not base its decision on a right correlative to the right to assistance of counsel. In fact, the Court explicitly repudiated the correlative right analysis relied upon by petitioner here. Id. at 819-20 n.15. In addition, the Court in Singer v. United States, 380 U.S. 24 (1965), cautioned courts against finding such correlative rights, for "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." Id. at 34-35.

Petitioner's argument that upholding the declaration of a mistrial will imprison him in his privileges ignores the cases in which mistrials declared over the defendant's objection or without the defendant's consent have been upheld. Illinois v. Somerville, 410 U.S. 458 (1973); see Gori v. United States, 367 U.S. 364, 368 (1961) (citing Dreyer v. Illinois, 187 U.S. 71 (1902), Logan v. United States, 144 U.S. 263 (1892), and Simmons v. United States, 142 U.S. 148 (1891)).

For the foregoing reasons, the petition for a writ of habeas corpus is denied.

Dated at Burlington in the District of Vermont,
this 13th day of October, 1977.



Albert W. Coffrin
District Judge

FOOTNOTES

1/ October 15, 1976 transcript at 3, 7, and 10.

2/ Petitioner's Memorandum of Law, filed June 27, 1977, Civ. No. 77-140, at 10 and 8.

3/ October 15, 1976 transcript at 9.

4/ Id. at 11.

5/ The circuit court found that any consideration of the reasonable alternative was "at best oblique." 522 F.2d at 53.

6/ Since we find there was no abuse of discretion, there is no need to consider petitioner's discussion on whether or not a verdict could have been sustained had the trial judge granted a continuance or continued the trial in defendant's absence.

Our holding in this case does not conflict with Commonwealth v. Bartolomucci, 362 A.2d 234 (Pa. 1976), as discussed by petitioner and respondent. In that case, the Pennsylvania Supreme Court affirmed the reversal of petitioner's conviction because the judge at the first trial dismissed the jury without directly inquiring whether they were hopelessly deadlocked, thereby creating a doubt as to whether they were so deadlocked. Consequently, the necessity of the mistrial was not manifest and the double jeopardy clause barred retrial. In the instant case there is no doubt that the trial judge knew of the alternatives to mistrial but in his discretion found a declaration of mistrial to be manifestly necessary.

7/ Vt. R. Cr. P. 43:

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented whenever a defendant, initially present,

(1) in noncapital cases, voluntarily absents himself after the trial was commenced, whether or not he has been informed by the court of his obligation to remain during the trial, . . .

8/ During the second conference with the trial judge and prosecuting attorney, defense counsel argued that because defendant could come to court, his decision to stay in the hospital made his absence from court voluntary within the meaning of Rule 43(b)(1). While our resolution of petitioner's second argument renders such a determination unnecessary, we note that we are in agreement with the Vermont Supreme Court that his absence was involuntary under that rule.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

SCOTT D. DUNKERLEY,
Petitioner,
v.

CORNELIUS HOGAN, Individually and
in his official capacity as
Commissioner of Corrections for
the State of Vermont,

RICHARD BASHAW, Individually and in
his official capacity as Superinten-
dent of the St. Albans Correctional
Facility, St. Albans, Vermont,
Respondents.

Civil Action
File No. 77-140

NOTICE OF APPEAL

Notice is hereby given that Scott D. Dunkerley, Petitioner
above named, hereby appeals to the United States Court of Appeals
for the Second Circuit from the order denying his petition for
a writ of habeas corpus entered in this action on the 13th day of
October 1977.

Montpelier, Vermont, 14th October 1977.


GLENN A. JARRETT
Defender, Correctional Facilities
State Office Building
Montpelier, VT 05602

Office of the
DEFENDER
GENERAL
Montpelier,
Vermont 05602
802 - 828-3168

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

SCOTT D. DUNKERLEY,
Petitioner,

v.

CORNELIUS HOGAN, Individually and
in his official capacity as
Commissioner of Corrections for
the State of Vermont,

RICHARD BASHAW, Individually and in
his official capacity as Superinten-
dent of the St. Albans Correctional
Facility, St. Albans, Vermont,
Respondents.

Civil Action
File No. 77-140

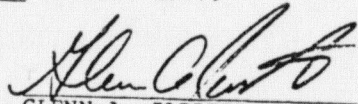
MOTION FOR STAY PENDING APPEAL

Pursuant to 28 U.S.C. §2251, petitioner hereby moves for a stay of the first degree murder trial now pending against petitioner in the Orleans Superior Court pending petitioner's appeal of the Court's order dated 13 October 1977 to the United States Court of Appeals for the Second Circuit.

If the Court does not see fit to grant petitioner a stay pending appeal, petitioner respectfully asks the Court for a stay of fourteen days for the sole and express purpose of affording petitioner time within which to seek a stay from the United States Court of Appeals for the Second Circuit.

The reason for this request for a stay is that petitioner's right to be free from double jeopardy will be lost if he is made to undergo a trial before the United States Court of Appeals for the Second Circuit can review his case.

Montpelier, Vermont, 14th October 1977.


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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

SCOTT D. DUNKERLEY,	)	
Petitioner,	)	
	)	
v.	)	
	)	
CORNELIUS HOGAN, Individually and	)	
in his official capacity as	)	Civil Action
Commissioner of Corrections for	)	File No. 77-140
the State of Vermont,	)	
	)	
RICHARD BASHAW, Individually and in	)	
his official capacity as Superinten-	)	
dent of the St. Albans Correctional	)	
Facility, St. Albans, Vermont,	)	
Respondents.	)	

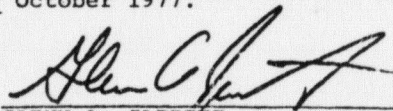
APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

Petitioner respectfully shows to the Court:

1. He made application to this Court for writ of habeas corpus, challenging the validity of his detention to await trial on the charge of first degree murder.
2. On 13 October 1977 this Court entered its order denying the said writ of habeas corpus and remanding petitioner to the custody of the respondents named herein.
3. Petitioner filed a notice of appeal from the order of this Court denying the said writ on 14 October 1977.
4. A certificate of probable cause is required by 28 U.S.C.A. §2253 before the appeal may be heard and determined on the merits.
5. Petitioner intends to raise on appeal his right to be free from double jeopardy, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Petitioner prays that the Court issue a certificate of probable cause for appeal.

Montpelier, Vermont, 14th October 1977.



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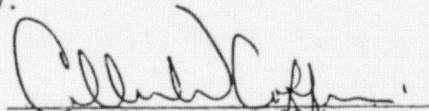
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Scott D. Dunkerley	:	
	:	
v.	:	Civil Action
	:	
Cornelius Hogan, Individually	:	File No. 77-140
and in his official capacity	:	
as Commissioner of Corrections	:	
for the State of Vermont, and	:	
Richard Bashaw, Individually	:	
and in his official capacity	:	
as Superintendent of the St.	:	
Albans Correctional Facility,	:	
St. Albans, Vermont	:	

CERTIFICATE OF PROBABLE CAUSE

Application having been made by the petitioner for a certificate of probable cause to appeal the order of dismissal in the above entitled matter, entered October 13, 1977, I do certify that, determined by an objective standard, there is ground to believe that the appeal is being taken in good faith.

Dated at Burlington in the District of Vermont,
this 19th day of October, 1977.


Albert W. Coffin
District Judge

11-17-77
(6)

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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Scott David Dunkerley :
v. : Civil Action
Cornelius Hogan, in his : File No. 77-140
official capacity as :
Commissioner of Corrections :
for the State of Vermont, and :
Theodore Allen, in his official :
capacity as Superintendent of :
the St. Johnsbury Community :
Correctional Center :

MEMORANDUM OPINION

Subsequent to this Court's denial of habeas corpus relief, petitioner filed a motion for stay pending appeal, and respondent filed a memorandum in opposition. Petitioner's motion was granted in open court following a hearing held on October 25, 1977 for the following reasons:

Section 2251 of 28 U.S.C. gives a United States District Court judge before whom a habeas corpus proceeding is pending, the authority to stay state court proceedings pending appeal. Although respondents concede this power, they argue that this court should exercise its discretion and deny the motion because petitioner's double jeopardy claim has been reviewed by the Vermont Supreme Court, because of the clear interest of the State in orderly prosecution of its criminal docket and because of long standing national policy of non-intervention by federal courts in state criminal prosecutions.

None of these reasons is persuasive. First, for purposes of a stay pending appeal of this court's decision, it does not matter that the same question on the same facts was decided by the highest state court. Second, a stay will not necessarily delay the state proceedings significantly because the State can seek an expedited appeal.

Third, while we support and follow the cases that encourage nonintervention by federal courts in state criminal prosecutions, none of the cases cited by respondents dictate, or even suggest, that we should not grant the stay here. In Abney v. United States, 97 S. Ct. 2034 (1977), the Supreme Court held that pretrial orders rejecting claims of double jeopardy are immediately appealable because "if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the [double jeopardy] clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." Id. at 2042 (emphasis in original). Thus Abney cuts in favor of granting the stay pending appeal. Also, the exposure to a second trial is no less burdensome because the Vermont Supreme Court has ruled on this case.

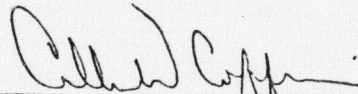
Respondents cite four cases for the proposition that a complaint of double jeopardy is not reviewable by habeas corpus but must be raised as a defense at trial. Lotz v. Sacks, 292 F.2d 657, 659 (6th Cir. 1961); Velazquez v. Sanford, 150 F.2d 491 (5th Cir. 1945); Gerrish v. Lovell, 88 F. Supp. 433 (D. Me. 1950); Ex parte Steele, 79 F. Supp. 428 (M.D. Pa. 1948). However, in all four cases, the petitioner had been convicted prior to filing his petition for habeas corpus.

Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971), concerned injunctions of and declaratory judgments regarding state court prosecutions by federal courts. The Supreme Court held that the plaintiffs had not shown irreparable injury sufficient for the injunction or declaratory judgment to issue because the plaintiffs were assured adequate vindication of their constitutional claims by raising them as a defense to the states' criminal prosecutions. In contrast, here, if we did not grant petitioner's motion for a stay and the state courts proceeded to trial in petitioner's criminal case, and if petitioner won on appeal from this court's decision, there can be no doubt but that petitioner would be irreparably injured and that that injury would be "both great and immediate." Younger, 401 U.S. at 46. The remaining cases cited by respondents are similarly unpersuasive. Trainor v. Hernandez, 97 S.Ct. 1911 (1977) (extended Younger to state attachment proceeding); Juidice v. Vail, 430 U.S. 327 (1977) (extended Younger to state contempt procedures); Kugler v. Helfant, 421 U.S. 117 (1975) (injunction of state criminal prosecution disallowed; Steffel v. Thompson, 415 U.S. 452 (1974) (no pending but genuine threat of state prosecution; challenge of constitutionality of state statute permitted)).

Petitioner's motion for a stay of state court proceedings pending appeal of this court's denial of habeas

corpus relief was properly granted following the hearing for the reasons expressed herein.

Dated at Burlington in the District of Vermont,
this 14th day of November, 1977.



Albert W. Coffrin
District Judge